

IN THE MATTER OF: Environmental Education Center, Don Edwards San Francisco Bay National Wildlife Refuge South Bay Asbestos Superfund Site San Jose, Santa Clara County, California City of San Jose, California, Settling Party	ADMINISTRATIVE AGREEMENT FOR RECOVERY OF PAST RESPONSE COSTS U.S. EPA Region IX CERCLA Docket No. 2006-14 PROCEEDING UNDER SECTION 122(h)(1) OF CERCLA 42 U.S.C. § 9622(h)(1)
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I. BACKGROUND

A. This Agreement provides for the reimbursement of response costs incurred by the EPA in connection with remedial and removal actions conducted at the Environmental Education Center ("EEC"), which is owned by the United States and operated by the U.S. Fish and Wildlife Service of the Department of Interior ("Service") as part of the Don Edwards San Francisco Bay National Wildlife Refuge, and is within the South Bay Asbestos Superfund Site ("Site").

B. The Site is located in the Alviso neighborhood of the City of San Jose, Santa Clara County, California ("City"). EPA alleges that the Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

C. From 1982 to 1984, the City arranged for the performance of interim emergency flood control measures and repair work at the EEC, with the consent of the Service. As part of this work, the City deposited soil at the EEC for construction of a road berm and a levee trail. After the work was completed, some unused soil remained in place at the EEC ("soil piles."). The deposited soil contained naturally occurring chrysotile asbestos. The City asserts that it did not know that the soil placed at the EEC contained asbestos in any form.

D. In 1985, EPA remedial investigation/feasibility study ("RI/FS") activities at the EEC revealed levels of 1% to 20% asbestos in the road berm, 20% to 30% asbestos in the levee trail, and 2% to 30% asbestos in the soil piles. To reduce the potential for asbestos exposure, in April 1986, EPA performed several emergency removal activities at the EEC including: (1) removal of the asbestos-contaminated soil piles; (2) placement of a polymer coating and gravel over the trail; and (3) paving of the berm with asphalt.

E. In May 1988, the City entered into an Administrative Order on Consent with EPA (Docket No. 88-15, "1988 AOC") pursuant to which the City was to develop and implement a workplan providing for elimination of the threat of release of asbestos at the EEC. In accordance

with the 1988 AOC, the City submitted a workplan in 1991 that provided for maintenance of the road berm seal and semi-annual inspections and maintenance of the levee trail or a complete removal of the remaining asbestos-containing soil from the EEC. In 1992, the City applied a polymer seal to both the levee trail and road berm. No other actions or sampling were conducted under the 1988 AOC.

F. In 2001, the City conducted soil sampling and confirmed asbestos to be present in surface soils under the levee trail and road berm in the 1% to 10% range. In 2002, the City put out to bid the project of excavating the contaminated soil at the EEC. However, the City was unable to carry out the project due to high bids and growing budget deficits.

G. An EPA inspection in July 2003 revealed significant deterioration of the cover material for all areas containing asbestos in soil at the EEC. Specifically, the polymer coating and gravel cover on the levee trail had worn off, and paving over the road berm had deteriorated, thereby exposing surface soils that contained asbestos levels as high as 10%. Vegetation had grown through the sides and slopes of the levee trail and through large cracks in the berm, allowing asbestos-containing material to erode down the slope toward the slough; samples showed that the berm slope contained from 1% to 10% asbestos. These contaminated materials were accessible to EEC visitors, including school age children on field trips and workers. EPA concluded that the condition of the levee trail and road berm posed a continual threat of release to the surrounding environment.

H. The City proposed to temporarily recap the levee trail and roadway during the summer of 2003, though the recapping did not occur. On September 23, 2003, EPA issued a Request for a Time-Critical Removal Action ("Action Memorandum") to mitigate the threat to human health and the environment from asbestos-containing soils at the EEC.

I. The response selected in the Action Memorandum was carried out pursuant to a work plan conducted by both EPA and the City ("2003 Work Plan"). In accordance with the 2003 Work Plan, EPA excavated and properly disposed of 4,500 cubic yards of asbestos-contaminated soils. The asbestos-contaminated soils were transported to the City-owned Nine Par Landfill Site. EPA provided for dust control during excavation and transport of the ACM soils. EPA verified the cleanup through sampling that showed that the average concentration of asbestos after entire excavation was 0.8 percent, below the Site's one percent asbestos cleanup level.

J. Pursuant to the 2003 Work Plan, the City arranged for proper handling and dust control measures of the asbestos-containing material at the Nine-Par Landfill and conducted Site restoration at the EEC. The City backfilled and restored the pre-existing grade in all the excavated areas with soil verified to be clean through sampling. The City replaced a fence along the levee trail and repaired other facilities damaged during excavation, transport, or restoration. The City also paved the levee trail with asphalt and installed a paved curb along the road adjacent to the berm.

K. The removal action was conducted by EPA and the City in accordance with Section 104(a)(1) of the Comprehensive Environmental Response, Compensation and Liability Act

("CERCLA"), 42 U.S.C. § 9604(a)(1), and Section 300.415 of the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 CFR § 300.415. The removal action contributed to the long-term remedial goals for the EEC by removing asbestos contamination above Site action levels at the EEC thus abating the threats from asbestos exposure at the EEC.

L. Both EPA and the City incurred response costs associated with response actions taken at the EEC to address asbestos-containing soil, including, but not limited to, costs associated with the 2003 Removal Action.

M. EPA alleges that City is a responsible party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is jointly and severally liable for response costs incurred or to be incurred by EPA at or in connection with the EEC.

N. EPA and the City recognize that this Agreement has been negotiated in good faith and that this Agreement is entered into without the admission or adjudication of any issue of fact or law.

II. JURISDICTION

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1), which has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D and redelegated to Region IX Superfund Branch Chiefs by EPA Region IX Delegation No. R9 1290.20 (September 29, 1997).

2. This Agreement is made and entered into by EPA and the City. The City consents to and will not contest EPA's authority to enter into this Agreement or to implement or enforce its terms.

III. DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Agreement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

a. "Agreement" shall mean this Agreement and any attached appendices. In the event of conflict between this Agreement and any appendix, the Agreement shall control.

b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

c. "Day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

e. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

f. "Paragraph" shall mean a portion of this Agreement identified by an Arabic numeral or a lower case letter.

g. "Parties" shall mean EPA and the City of San Jose, California.

h. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that EPA has incurred prior to the effective date of the Agreement at or in connection with response actions taken at the EEC, including, but not limited to, the costs incurred in performance of the work in the 2003 Action Memorandum as set forth in Appendix D (Superfund Cost Summary, September 24, 2003 through April 30, 2004), plus accrued Interest on all such costs from November 12, 2004 through the date of payment.

i. "Section" shall mean a portion of this Agreement identified by a Roman numeral.

j. "Settling Party" shall mean the City of San Jose, California.

k. "Site" shall mean the South Bay Asbestos Superfund site, located in the Alviso neighborhood of the City of San Jose, California, and generally shown on the map included herein as Appendix B.

l. "United States" shall mean the United States of America, including its departments, agencies, and instrumentalities.

IV. PARTIES BOUND

4. This Agreement shall be binding upon EPA and upon the City, its successors and assigns. Any change in ownership or corporate or other legal status of the City, including but not limited to, any transfer of assets or real or personal property, shall in no way alter the City's responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement and to bind legally the party represented by him or her.

V. PAYMENT OF RESPONSE COSTS

5. Within 30 days of the effective date of this Agreement, Settling Party shall pay to EPA \$245,290.70, plus an additional sum for Interest on that amount calculated from November 12, 2004, through the effective date of this Agreement.

6. Payment shall be made to EPA by Electronic Funds Transfer ("EFT") in accordance with current EFT procedures to be provided to Settling Party by EPA Region IX, and shall be accompanied by a statement identifying the name and address of the Party making payment, the Site name, the EPA Region, Site/Spill ID Number R942, and EPA docket Number 2006-14.

7. At the time of payment, Settling Party shall also send notice that payment has been made to EPA in accordance with Section XII (Notices and Submissions). Such notice shall reference the EPA Region, Site/Spill ID Number R942, and the EPA docket Number 2006-14.

8. The total amount to be paid pursuant to Paragraph 5 shall be deposited in the South Bay Asbestos Superfund Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

VI. FAILURE TO COMPLY WITH AGREEMENT

9. Interest on Late Payments. If the City fails to make any payment required by Paragraph 5 by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

10. Stipulated Penalty.

a. If any amounts due to EPA under Paragraph 5 are not paid by the required date, the City shall be in violation of this Agreement and shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 6, \$1,000 per day that such payment is late.

b. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of the Party making payment, the Site name, the EPA Region, Site/Spill ID Number R942, and EPA docket Number 2006-14. Settling Party shall send the check (and any accompanying letter) to:

EPA Superfund
U.S. Environmental Protection Agency
Region 9 Superfund Receivable
P.O. Box 371099M
Pittsburgh, PA 15251

c. At the time of each payment, Settling Party shall also send notice that payment has been made to EPA in accordance with Section XII (Notices and Submissions). Such notice shall identify the EPA Region and Site Spill ID Number R942, and EPA docket Number 2006-14.

d. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Party of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

11. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to EPA by virtue of the City's failure to comply with the requirements of this Agreement, should Settling Party fail or refuse to comply with the requirements of this Agreement, it shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States, on behalf of EPA, brings an action to enforce this Agreement, Settling Party shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

12. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Agreement. Payment of stipulated penalties shall not excuse the City from payment as required by Section V or from performance of any other requirements of this Agreement.

VII. COVENANT NOT TO SUE BY EPA

13. Covenant Not to Sue by EPA. Except as specifically provided in Section VIII (Reservations of Rights by EPA), EPA covenants not to sue or take administrative action against Settling Party, the City, pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant shall take effect upon receipt by EPA of all amounts required by Section V (Payment of Response Costs) and any amounts due under Section VI (Failure to Comply with Agreement). This covenant not to sue is conditioned upon the satisfactory performance by the City of its obligations under this Agreement. This covenant not to sue extends only to the City and does not extend to any other person.

VIII. RESERVATIONS OF RIGHTS BY EPA

14. EPA reserves, and this Agreement is without prejudice to, all rights against the City with respect to all matters not expressly included within the Covenant Not to Sue by EPA in Paragraph 13. Notwithstanding any other provision of this Agreement, EPA reserves all rights against the Settling Party with respect to:

- a. liability for failure of the City to meet a requirement of this Agreement;
- b. liability for costs incurred by the United States that are not within the definition

of Past Response Costs;

c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;

d. criminal liability; and

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

15. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation, or other entity not a signatory to this Agreement.

IX. COVENANT NOT TO SUE BY CITY

16. The City covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs or this Agreement, including but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claims arising out of the response actions at the EEC for which the Past Response Costs were incurred, including any claim under the United States Constitution, the Constitution of the State of California, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.

17. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

18. This Agreement is intended to supersede and extinguish the obligations imposed on the City under the terms of the May 8, 1988 Consent Agreement.

19. Nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Agreement. The Parties expressly reserve any and all

rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

20. EPA and the City agree that the actions undertaken by the City in accordance with this Agreement do not constitute an admission of any liability by the City. The City does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in Section I of this Agreement.

21. The Parties agree that City is entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Agreement. The "matters addressed" in this Agreement are Past Response Costs.

22. The City agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement, it will notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. The City also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Agreement, it will notify EPA in writing within 10 days of service of the complaint or claim upon it. In addition, the City shall notify EPA within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Agreement.

23. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other relief relating to the EEC, the City shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue by EPA set forth in Section VII.

XI. RETENTION OF RECORDS

24. Until five years after the effective date of this Agreement, the City shall preserve and retain all records, reports, or information (hereinafter referred to as "records") now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the EEC or to the liability of any person under CERCLA with respect to the EEC, regardless of any retention policy to the contrary.

25. After the conclusion of the five-year document retention period in the preceding paragraph, the City shall notify EPA at least ninety days prior to the destruction of any such records and, upon request by EPA, the City shall deliver any such records to EPA. The City may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the City asserts such a privilege, it shall provide EPA with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (e.g.,

company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to EPA in redacted form to mask the privileged information only. The City shall retain all records that they claim to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the City's favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the EEC shall be withheld on the grounds that they are privileged.

26. The City hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the EEC since notification of potential liability by the United States or the State of California or the filing of suit against it regarding the EEC and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XII. NOTICES AND SUBMISSIONS

27. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Party in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA and the City.

As to EPA:

Bethany Dreyfus
Assistant Regional Counsel
U.S. EPA Region IX
75 Hawthorne Street, ORC-3
San Francisco, CA 94105

Eric Yunker
Superfund Project Manager
U.S. EPA Region IX
75 Hawthorne Street, SFD-7-3
San Francisco, CA 94105

David Wood
Superfund Accounting Program
Policy and Management Division
U.S. EPA Region IX, PMD-6
75 Hawthorne Street
San Francisco, CA 94105

As to Settling Party:

Mollie Dent
Senior Deputy City Attorney
City of San Jose
200 E. Santa Clara Street, 16th Floor
San Jose, CA. 95113

Calvin Matsui
Utilities and Storm Section Manager
Department of Public Works
City of San Jose
1661 Senter Road, Building A, 3rd Floor
San Jose, CA. 95112

XIII. INTEGRATION/APPENDICES

28. This Agreement and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Agreement. The following appendices are attached to and incorporated into this Agreement: "Appendix A" is EPA's 2003 Action Memorandum dated September 24, 2003; "Appendix B" is a map of the Site

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indicating the EEC; "Appendix C" is the October 2003 Work Plan; and "Appendix D" is the Superfund Cost Summary.

XIV. PUBLIC COMMENT

29. This Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

XV. ATTORNEY GENERAL APPROVAL

30. The Attorney General or [his/her] designee has approved the settlement embodied in this Agreement in accordance with Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1).]


XV. EFFECTIVE DATE

31. The effective date of this Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 29 has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Agreement.

IT IS SO AGREED:

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION IX

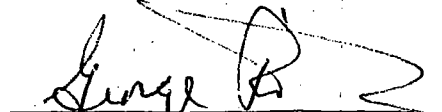
By:


ELIZABETH ADAMS
Chief, Site Cleanup Branch
Superfund Division

September 5, 2006
DATE


FOR THE CITY OF SAN JOSE, CALIFORNIA:

By:


GEORGE MOS
Assistant City Attorney

JUL 12 2006
DATE

APPROVED AS TO FORM:


Mollie J. Dent
Senior Deputy City Attorney